

BLAINE SHARP

IBLA 84-700

Decided November 22, 1985

Appeal from decision of the Elko, Nevada District Office, Bureau of Land Management, rejecting in part an application for desert land entry. N-23904.

Affirmed.

1. Desert Land Entry: Applications--Desert Land Entry: Water Right

A desert land entry application is properly rejected when a conflicting application has shown sufficient evidence of a water right and has been allowed for entry for the same land. A desert land entry application is properly considered by BLM prior to a conflicting application where the record shows it was drawn with first priority in a drawing held July 30, 1979, consistent with 43 CFR 1821.2-3, pursuant to a notice published in the Federal Register opening the subject lands in Nevada to desert land filings.

APPEARANCES: P. Michael Marfisi, Esq., Elko, Nevada, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Blaine Sharp has appealed from a May 14, 1984, decision of the Elko, Nevada, District Office, Bureau of Land Management (BLM), which rejected in part his desert land entry application N-23904, filed under authority of the Desert Land Act, 43 U.S.C. § 321 (1982), because an application that had priority over his application (N-23318) had been allowed the right of entry, and, therefore, the applied-for lands were no longer available for entry.

The record shows that appellant filed desert land entry application N-23904 on April 2, 1979, for 320 acres described as the SW 1/4 NW 1/4 and NW 1/4 SW 1/4 of sec. 14 and the S 1/2 NE 1/4, SE 1/4 NW 1/4, NE 1/4 SW 1/4 and N 1/2 SE 1/4 of sec. 15, T. 32 N., R. 69 E., Mount Diablo Meridian, Nevada. The lands had been opened to Desert Land Act filing pursuant to a notice published in the Federal Register, 43 FR 59555, December 21, 1978, which established a simultaneous filing period effective January 1, 1979. The notice specifically provided in pertinent part: "All properly filed applications filed by March 31, 1979, will be considered to have been filed

simultaneously and will be assigned a priority as provided in 43 CFR 1821.2-3. Applications filed after March 31, 1979, will be granted priority in the order in which they are filed." 1/

A simultaneous drawing was held July 30, 1979, consistent with the requirements of 43 CFR 1821.2-3 2/ in which appellant's application did not receive a priority assignment. BLM notified appellant by certified letter of January 18, 1980, that application N-23318 had priority over his entire application area and application N-22732 had priority over both applications as to the NW 1/4 SW 1/4 of sec. 14. He was also informed that further action on his application would be suspended pending final action on N-23318 and N-22732 and that he could file an application for another location any time during the suspense period. Subsequently, after 280 acres of desert land application N-23318 was allowed for entry March 18, 1983, and the required first annual proof was submitted March 13, 1984, BLM issued its decision of partial rejection as to lands conflicting with that entry.

Appellant objects to the BLM decision contending that his Nevada State Water Application No. 37183 predated State Water Application No. 37579 by J. Lind, the applicant in N-23318. He states:

Entry of decision on Application No. N-23318 was in error and contrary to law. Mr. Sharp's Application File N-23904, included evidence of Mr. Sharp's Nevada State Water Application No. 37183, which predated State Water Application No. 37579 by J. Lind (your File N-23318) to whom your office allowed the right of entry. The Sharp and Lind files respectively were available to your department. The State of Nevada had taken no action and has yet to take action on the Sharp Water Application No. 37183. The State of Nevada Engineer erroneously issued Permit to J. Lind under his Application No. 37579, apparently after receiving notification from the Bureau of Land Management that it had approved Lind's Desert Land Application (N-23318).

Sharp is entitled to the approval of his Water Application, by virtue of his prior filing all in accordance with Nevada law

1/ Appellant's application was filed Apr. 2, 1979; however, BLM treated all filings made between Jan. 2 and Apr. 2, 1979, as simultaneously filed.

2/ This regulation provides in pertinent part:

"(a) Two or more documents are considered as simultaneously filed when:

* * * * *

"(2) They are filed pursuant to an order which specifies that documents delivered to and received by the proper office during a specified period shall be considered as simultaneously filed.

"(b) Whenever it is necessary, for the purposes of the regulations in this chapter, to determine the order of priority of consideration among documents which have been simultaneously filed, such order of priority will be established by a drawing open to public view."

to which the BLM is subject. By obtaining the water right, Sharp would be entitled to the Desert Land Entry. The Bureau of Land Management should have determined the status of the Sharp water right filing prior to any issuance of the Desert Land Entry to anyone.

Statement of Reasons at 2.

[1] As appellant has indicated, sufficient evidence of a water right is critical to the allowance of a desert land entry under the Desert Land Act, 43 U.S.C. § 321 (1982). The Act provides for the entry of desert lands for the purpose of reclaiming them "by conducting water upon the same * * * Provided, however, that the right to the use of water by the person so conducting the same * * * shall depend upon bona fide prior appropriation."

The pertinent regulation, 43 CFR 2521.2(d), provides that no desert land entry application will be allowed unless accompanied by evidence satisfactorily showing that the intending entryman has acquired the right to permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought, or that he has initiated and prosecuted, so far as then possible, appropriate steps looking to the acquisition of such a water right. Elmer A. Kubler, 80 IBLA 283 (1984); Janice Pearson, 73 IBLA 220 (1983).

However, contrary to appellant's contentions, the priority for desert land applications for these particular public lands in Nevada was not established by the order of filing applications for water rights with the State, but rather by the simultaneous drawing held by BLM on July 30, 1979. This procedure was established by the Federal Register notice of December 21, 1978, and was properly carried out pursuant to the cited regulations in 43 CFR 1821.2-3. If the priority were established as appellant asserts, there would be no useful purpose served by BLM holding a simultaneous drawing and the State of Nevada would be in control of the disposition of these public lands. That result clearly was not the intent of opening these lands to desert land applications, and BLM properly determined that appellant's application should be rejected in the face of the allowed entry for the same lands.

With respect to appellant's reliance on his earlier filing for a water permit from the State, it is noted that an application for a permit submitted to the Nevada State Engineer does not remain an active application indefinitely. Moreover, the State of Nevada would not issue a water right permit to an applicant until that applicant first could show ability to make beneficial use of the water on lands he owns or controls. Under Nevada State procedures, an application will normally be acted upon within 60 days of filing with an allowance for one extension of another 60 days. See Jean P. Walsh, 89 IBLA 311 (1985). Therefore, unless the applicant has obtained the right to enter Federal lands for a desert land entry shortly after filing for a State water permit, that application would be rejected by the State of Nevada long before action is taken by BLM on the desert land application. Jean P. Walsh, supra at 314. Accordingly, the order of filing for a 1979 water permit application to the State has no relevance to our consideration of the BLM allowance of a desert land entry in 1983.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Wm. Philip Horton
Chief Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Gail M. Frazier
Administrative Judge

